LIBRARY
SUPREME COURT, U. S.

NOV 13 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-602

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## PETITIONER'S REPLY BRIEF

FRANK L. SEAMANS, ESQ.
DONALD C. WINSON, ESQ.
DALE HERSHEY, ESQ.
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219

and

GEORGE D. BRODIGAN, ESQ.
700 Main Street
Hartford, Connecticut 06115
Attorneys for Petitioner

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

## INDEX


| | PAGE |
|---|---|
| Argument | 3 |
| I. This Court Should Grant the Petition in Order to Determine Whether Blue Cross's Dominant Market Position Is Justified Because That Position Is "Thrust Upon" Blue Cross by Actions of the Pennsylvania Insurance Commissioner | 3 |
| II. This Court Should Grant the Petition in Order to Interpret and Harmonize the Conflicting Aims of the McCarran Act — To Preserve State Regulation of the Business of Insurance and to Protect Competition | 5 |
| Conclusion | 9 |


## TABLE OF CITATIONS

### CASES


| | |
|---|---|
| Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 483 (E.D. Mo. 1965) *aff'd*, 368 F.2d 679 (8th Cir. 1966) | 5 |
| Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1091, 1094 (D. Md. 1969) | 5 |
| United States v. Besser Mfg. Co. 96 F. Supp. 304 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952) | 4 |
| United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944) | 6 |
| United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 447 U.S. 521 (1954) | 3 |
| Weiner v. Hospital Service Plan, 13 D. & C. 2d 689 (1958), *aff'd*, 187 Pa. Superior Ct. 244 (1958) | 2 |


### ACTS


| | |
|---|---|
| 15 U.S.C. § 1012(b) | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-602

THE TRAVELERS INSURANCE COMPANY,
Petitioner,
v.
BLUE CROSS OF WESTERN PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## PETITIONER'S REPLY BRIEF

Respondent's ("Blue Cross's") brief demonstrates the critical importance and novelty of the issues raised by the petition for certiorari filed by The Travelers Insurance Company ("Travelers"). In this reply brief, Travelers will address the arguments first raised in the respondent's brief.

The position taken by Blue Cross in opposition to the Travelers' petition for a writ of certiorari is basically that the Blue Cross system is good for a great number of people, gives broader and better coverage than commercial insurance, was first on the scene,

solved a serious problem, provides a vehicle which helps to hold down hospital costs, is cheaper than commercial insurance, represents a policy endorsed by the State Legislature, and consequently is exempt from the Sherman Act under the McCarran exemption and does not violate the Sherman Act because the dominance of Blue Cross is a result of public acceptance.

Whether or not these conclusions are true, they are not legal arguments. They are arguments which should be addressed to the Pennsylvania legislature to gain support for a bill directly granting Blue Cross a monopoly and specifically authorizing it to conduct anticompetitive practices. Pennsylvania courts have held that Blue Cross does not now have a statutory monopoly. *Weiner v. Hospital Service Plan,* 13 D. & C. 2d 689 (1958), *aff'd,* 187 Pa. Superior Ct. 244 (1958). No Pennsylvania statute grants Blue Cross a monopoly.

Obviously, if Blue Cross is to sweep the field so that 100% of hospital patients are either Blue Cross patients or Medicare patients, then there will be no source of patients from which to extract by higher charges the roughly 14% extra needed to sustain the hospitals' full operation, i.e., to pay for indigent and non-paying patients and to build up reserves for expansion. The effect, therefore, on the community if Blue Cross achieves a complete monopoly will be most significant. It is, therefore, in the national interest that there be a clear legal decision on these issues and not a mere popularity vote for or against the Blue Cross system.

## ARGUMENT

### I. This Court Should Grant the Petition in Order to Determine Whether Blue Cross's Dominant Market Position Is Justified Because That Position Is "Thrust Upon" Blue Cross by Actions of the Pennsylvania Insurance Commissioner.

Blue Cross devotes at least one-third of its brief to a statement of its version of the facts. Blue Cross pictures itself as a small community service enterprise which provides full service benefits to the people of Western Pennsylvania. It argues that its dominant position in the private hospital insurance market is due to the extent of its benefits and to the fact it will insure high-risk persons and others who cannot obtain full-service hospitalization coverage from commercial carriers.

In making this argument, Blue Cross, like the courts below, has oversimplified the case and ignored a substantial body of law. The case raises the question of whether Blue Cross's obtaining a discount is a violation of the Sherman Act. The fact that Blue Cross is able to use the discount to increase the scope of insurance benefits and to provide coverage to high risk groups may be true, but these circumstances are clearly irrelevant under the antitrust laws. The fact that an antitrust violation enables a competitor to offer a certain service to the community does not provide a justification for the antitrust violation. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 447 U.S. 521 (1954).

This case focuses on the fact, undenied by Blue Cross, that the discount results in a discrimination

among hospital patients according to the type of insurance they have. A commercially insured patient who is hospitalized for an appendectomy is charged more by the hospital than the hospital charges Blue Cross when the exact same services are provided to one of its subscribers. Petition, App. B, 13a. This discrimination is solicited by Blue Cross, granted by the hospitals, and approved by the Pennsylvania Insurance Commissioner, without any regard to its impact on competition. It is Travelers' position that this discrimination, which leads ultimately to Blue Cross's dominant market share, is illegal under the antitrust laws and without rational foundation under the Fourteenth Amendment.

Travelers has raised what it deems to be valid legal arguments on issues which should be resolved by this Court. Blue Cross's repeated reference to its history of community service does not meet Travelers' arguments or deny the importance of issues raised by Travelers. The facts remain that Blue Cross enjoys a 62% share of the relevant market; it also enjoys a 14% discount in the cost of hospital care, which discount is not available to its commercial insurance competitors or their policyholders; its competitors, which account for the remaining 38% of the relevant market, each have only an infinitesimal market share when compared with that of Blue Cross.*

---

*In *United States v. Besser Mfg. Co.*, 96 F. Supp. 304 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952), the court said, "When two closely related corporations have 65 per cent of the dollar value of any industry and the balance is divided between over 50 other manufacturers with the nearest competitor having less than 8 per cent of the whole, we believe that such a combination has to all intents and purposes a monopoly within the meaning

**The courts below have found that the Pennsylvania Insurance Commissioner dictated the terms of the hospital contract which result in Blue Cross's obtaining the discount. The discount results in Blue Cross's dominant market position. The question which Travelers asks this Court to resolve is whether Blue Cross's dominant market position is defensible on the ground that its position was indirectly "thrust upon" it by actions of the Pennsylvania Insurance Commissioner.**

## II. This Court Should Grant the Petition in Order to Interpret and Harmonize the Conflicting Aims of the McCarran Act — To Preserve State Regulation of the Business of Insurance and to Protect Competition.

Though many cases have arisen under the McCarran Act, no case has dealt with the manner in which antitrust remedies are integrated with state regulations. The McCarran Act clearly legitimatized state regulation of the interstate business of insurance and, to a certain extent, made state regulation primary over federal regulation of that business. It was not its purpose, however, to destroy any rights to remedies for anticompetitive behavior.

The conflicting purposes of the McCarran Act are indicated in its reference to state regulation on the one hand and the Federal antitrust laws on the other. The

---

of the law." 96 F. Supp. at 307. See also *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1091, 1094 (D. Md. 1969) (market share of 52.6%-67%) and *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 483 (E.D. Mo. 1965), *aff'd*, 368 F. 2d 679 (8th Cir. 1966) (market share of 55%-60%).

Act was passed in 1945 as the result of a compromise between the insurance industry, whose chief spokesman was Senator Ferguson, and those interested in strict antitrust enforcement, whose chief spokesman was Senator Pepper. Out of the compromise, the insurance industry got the provision which maintained state regulation over the business of insurance, which had then recently been held to be in interstate commerce. *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944). Out of the same compromise, the group interested in antitrust enforcement got the provision that the states would be given three years in which to regulate the competitive behavior of the business of insurance, and, to the extent that the state failed to do so, the Federal antitrust laws would apply to that business. 91 Congressional Record 1442-4, 1477-89.

Travelers raises here for the first time the question of how antitrust remedies are to be harmonized with state regulation of the business of insurance. The principle advanced by Travelers and implied in the many cases cited in Travelers' petition (pp. 14-15) is that the right to a remedy under the Sherman Act is destroyed under the McCarran Act only if the state has undertaken to regulate competitive behavior. Under this arrangement, a victim of anticompetitive behavior would first consider whether he had a cause of action under state law, but if the state failed to regulate the competitive behavior and to provide a remedy for violation of the regulation, the victim would retain a cause of action under the Sherman and Clayton Acts. As one Senator said in support of the McCarran Act during the debate concerning its passage, "[I]nsofar as the States step into the picture affirmatively and act by regulation,

they may do so. . . . Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again." 91 Congressional Record 1444. With respect to Blue Cross, there is no Pennsylvania statute which "covers the same ground covered by the Sherman Act."*

Blue Cross's argument on this novel point fails to harmonize the conflicting aims of the McCarran Act — to preserve state regulation of the business of insurance and to provide comprehensive antitrust remedies. Under Blue Cross's interpretation, Travelers is left with no forum or remedy under either state or Federal law: the Insurance Commissioner, who has no statutory power over the competitive behavior of Blue Cross, can-

---

*Blue Cross's brief incorrectly states Travelers' position regarding the kind of state regulation necessary under the McCarran Act to produce antitrust immunity. It is not Travelers' position that the state regulation must be "clothed in the garb of antitrust enforcement." Respondent's Brief, pp. 20-21.

It is the intent of the McCarran Act that state regulation must be addressed to the issue of competitive behavior. The state regulation might address the problem by eliminating competition — by, for example, permitting insurance rating bureaus to fix prices under a state regulated procedure. But by addressing the issue of competition, even in this way, the state would have, in the Senator's words, "covered the same ground as the Sherman Act." If the state fails to address the issue of competition, the Sherman Act would apply. As stated in the McCarran Act, "the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b).

Pennsylvania's regulation of Blue Cross does not extend into the area of regulation of competition. Therefore, the Federal antitrust laws apply to Blue Cross.

not hear the case; the state regulations applicable to Blue Cross do not deal with the problem of competition and do not provide remedies for victims of Blue Cross's anticompetitive behavior; the Federal antitrust laws are not available, according to Blue Cross's argument, because the state does regulate certain features of Blue Cross's operations.

It was not the purpose of Congress in passing the McCarran Act to permit insurance entities to engage in unregulated anticompetitive behavior. This Court should hold that because the competitive behavior of Blue Cross is not regulated by the state, that behavior is subject to the Federal antitrust laws. The McCarran Act exempts the business of insurance from the Federal antitrust laws only to the extent that that business is regulated by state law.

This case brings to the Supreme Court a question which has been frequently asked but never answered: What kind of regulation is necessary to satisfy the requirements of the McCarran Act so that state regulation may be predominant while the objectives of the antitrust laws are not thwarted?

## CONCLUSION

To resolve the important and novel issues raised by this case, the Supreme Court should grant the petition for a writ of certiorari.

Respectfully submitted,

FRANK L. SEAMANS, ESQ.
DONALD C. WINSON, ESQ.
DALE HERSHEY, ESQ.

and

GEORGE D. BRODIGAN, ESQ.